

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER

Application 24379 Permit 17461 License

**ORDER APPROVING A NEW DEVELOPMENT SCHEDULE
AND AMENDING THE PERMIT**

WHEREAS:

1. Permit 17461 was issued to George C. Fotinos, Vivian Fotinos, Tom D. Fotinos, and Martha Fotinos on October 23, 1978, pursuant to Application 24379.
2. Permit 17461 was subsequently assigned to George C. Fotinos, Vivian Fotinos, and Martha Fotinos.
3. A petition for an extension of time within which to develop the project and apply the water to the proposed use has been filed with the State Water Resources Control Board.
4. The permittee has proceeded with diligence and good cause has been shown for said extension of time.
5. Permit Condition 12 pertaining to the continuing authority of the State Water Resources Control Board should be updated to conform to Section 780(a), Title 23 of the California Code of Regulation.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Condition 9 of the permit be amended to read:

COMPLETE APPLICATION OF THE
WATER TO THE PROPOSED USE
SHALL BE MADE ON OR BEFORE

December 31, 2005

(0000009)

2. Condition 12 of the permit be amended to read:

Pursuant to California Water Code Sections 100 and 275, and the common law public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in

accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to eliminating waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution Article X, Section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.

(0000012)

Dated: FEBRUARY 16 1995

Roger Schumm
for Edward C. Anton, Chief
Division of Water Rights

P17461

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permit 17461)	
(Application 24379))	ORDER: WR 88- 26
GEORGE C. FOTINOS, et al.,)	
Permittees and)	SOURCE: Two unnamed streams
Petitioners.)	tributary to the
	Napa River
	COUNTY: Napa

ORDER GRANTING PETITION FOR AN EXTENSION OF TIME,
DELETING BUHMAN CREEK AS A PERMITTED SOURCE,
AND ADJUSTING RELATIVE PRIORITIES

BY THE BOARD:

1.0 INTRODUCTION

The Board having initiated statutory revocation proceedings; the permittees having requested a hearing; the permittees having filed a Petition for Extension of Time; notice of hearing having been given; a hearing having been held on October 19, 1988 by the State Water Resources Control Board (Board); permittees having appeared and presented testimony and exhibits at the hearing; the evidence having been duly considered; the Board finds as follows:

2.0 PERMIT 17461

Application 24379 was filed on May 25, 1973 and the Board issued Permit 17461 on October 23, 1978. The permit authorizes diversion of 25 acre-feet per annum

to storage from September 1 of each year to June 1 of the succeeding year for purposes of irrigation, frost protection, recreation, and wildlife enhancement. One point of diversion is authorized on each of two unnamed streams both tributary to the Napa River. The larger tributary is also known as Buhman Creek, and for purposes of this order, the larger tributary will be referred to as Buhman Creek. The smaller tributary will be referred to as the unnamed stream.

As originally issued, permit conditions 8 and 9 required the permittees to complete construction of the project on or before December 1, 1981 and to demonstrate complete application of the water to the proposed uses on or before December 1, 1982.

3.0

BACKGROUND

The Board's staff inspected the proposed project on May 3 and May 26, 1983. The inspections revealed that no work had been started on the project and there was no evidence that the permittees had exercised due diligence in pursuing the project. Consequently, Board staff recommended that the permit be revoked. However, after being advised of the death of one of the permittees, the Board determined that good cause existed for an extension of time and on May 10, 1984 adopted an

order which granted the permittees a time extension (WR 1n). The order extended the time for completion of construction until December 1, 1985 and extended the time for making beneficial use of the water until December 1, 1986.

Board staff inspected the project for a second time on May 20, 1987. The inspection revealed that no work had been started on the project and there was no evidence that the permittees had exercised due diligence in pursuing the project. Again, Board staff recommended that the permit be revoked.

By letter dated January 5, 1988 (WR 1l), the permittees were advised to submit a request for revocation of the permit and to reapply for a new water right permit when and if they decide to construct the reservoir. By letter dated January 26, 1988 (WR 1k), the permittees stated that financial problems had prevented commencement of construction of the project and that financing for the project had finally been secured. The permittees also requested an extension of time to begin construction.

By letter dated February 16, 1988 (WR 1j), the permittees were notified that lack of money was not a valid

reason for granting additional time to complete a project; however, forms were provided for filing a petition for an extension of time. The permittees were advised that statutory revocation procedures would be commenced if the Board did not receive the forms within 30 days.

By certified letter dated April 26, 1988 (WR 1i), the Board initiated statutory revocation procedures pursuant to Water Code Section 1410, et seq. By letter dated May 6, 1988 (WR 1h), the permittees requested a hearing and informed the Board that they intended to start construction in May 1988. However, on August 11, 1988, the permittees contacted the Board to inform staff that they had applied for a county grading permit and that they would begin construction upon receipt of the permit (WR 1d). Board staff advised the permittees that they were proceeding at their own risk since the time to complete construction had expired and revocation proceedings had begun. Further, the permittees were advised that a Petition for Extension of Time had not been received as requested in the Board's letter dated February 16, 1988 (WR 1j).

On August 25, 1988, the Board received a Petition for Extension of Time (WR 1e). On September 7 and 8, 1988,

the permittees contacted the Board to report that the reservoir had been constructed (WR 1b and 1c). Construction of the reservoir was confirmed by staff field inspection on September 14, 1988 (WR 1a). The irrigation system has not been completed yet.

4.0

HEARING ISSUES

The following issues were noticed for hearing on September 19, 1988:

- "1. Should Permit 17461 (Application 24379) be revoked for failure to complete the project and put the water to beneficial use?
- "2. Should the permittees be granted an extension of time to complete construction and put the water to beneficial use?
- "3. If an extension of time is granted, to what dates should the time be extended?
- "4. If an extension of time is granted, should the priority of Permit 17461 be changed relative to the priorities of other applications, permits, and licenses which authorize the diversion of water from the same source of water and were filed or issued after May 25, 1973?"

5.0

APPLICABLE LAW

Water Code Section 1410, et seq., applies to the revocation of permits. Section 1410(a) states:

"There shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or

the water applied to beneficial use as contemplated in the permit and in accordance with this division and the rules and regulations of the Board."

Title 23, California Code of Regulations Section 840, et seq., applies to extensions of time. Section 844 states:

"An extension of time within which to complete an application, to commence or complete construction work or apply water to full beneficial use will be granted only upon such conditions as the board determines to be in the public interest and upon a showing to the board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay. The board may, in its discretion, require a hearing upon notice to the permittee and such other parties as the board may prescribe."

6.0 DELETION OF BUHMAN CREEK FROM PERMIT 17461

We find that in Buhman Creek, water is available only during the rainy season and that water must be stored in order to be used during the irrigation season.

There are numerous water users on Buhman Creek with rights which are junior to Permit 17461. These water users could be prejudiced by the permittees' development of the project at this time.

In the cover letter attached to the Notice of Intent to Appear, the permittees stated that they did not intend to use point of diversion number one from Buhman Creek (Permittees 2). Further, during the hearing, the permittees stipulated that point of diversion number one could be deleted from Permit 17461 and that Buhman Creek could be deleted as a source of water for Permit 17461. By deleting Buhman Creek as a source of water, any adverse impacts to the water users on Buhman Creek due to the permittees' development of the project at this time will be avoided. Therefore, point of diversion number one will be deleted from Permit 17461 and Buhman Creek will be deleted as a source of water for Permit 17461.

7.0

ADJUSTMENT OF WATER RIGHTS PRIORITIES

The Clos du Val Wine Company, Ltd. (Clos du Val) holds the only water right (Application 25561, Permit 17739) on the unnamed stream which is junior to Permit 17461. Clos du Val pursued its project diligently and complied with the terms of its permit.

When it is in the public interest, the Board is authorized to adjust the priorities of water rights. United States v. SWRCB (1986) 182 Cal.App.3d 82, 132, 227 Cal.Rptr. 161, 189; Water Code Section 1253.

We find that in the unnamed stream, water is available only during the rainy season and that water must be stored for use during the irrigation season. Further, there is not always enough water to satisfy the demands of all of the diverters from the unnamed stream. During the hearing, the permittees stipulated to Permit 17461 being made junior in priority to all existing priorities on the unnamed stream. Only Permit 17739 of Clos du Val would be affected by this change in priority. Because Clos du Val diligently pursued its project while the permittees did not, inadequate water is available for all rights in all years, and the permittees have agreed to accept a priority junior to that of Clos du Val, we find that it is in the public interest to adjust the relative priority of Permits 17461 and 17739.

8.0

COMPLIANCE WITH CALIFORNIA ENVIRONMENTAL QUALITY ACT

The revocation action, including the change in priority of Permit 17461, is exempt from the California Environmental Quality Act (CEQA) (Public Resources Code Section 21000, et seq.) because it is an enforcement action. 14 California Code of Regulations 15321. A negative declaration was prepared on Application 24379 pursuant to 14 CCR 15070, et seq., on July 7, 1978. A

second negative declaration is unnecessary for the Board's action in approving the time extension on the same project described in Application 24379 (Permit 17461) because the project will be reduced in scope and there will be no additional environmental impacts resulting from the project.

9.0

CONCLUSION

There appears to be cause to revoke the permit or to grant a time extension in this matter. The permittees exercised due diligence in pursuing the project only after the revocation proceedings had begun. The reasons given by the permittees for not starting construction earlier were a lack of finances to pursue the project, a death in the family, and temporary disability of one of the permittees. These reasons are not generally accepted as good cause for delay. 23 CCR 844. However, since the reservoir has been constructed, the permittees are now diligently pursuing the project, and the permittees have agreed to stipulations to hold harmless other water users (Sections 6.0 and 7.0), we find that it is in the public interest to grant a time extension in this matter with conditions implementing the stipulations rather than to revoke the permit and require the permittees to reapply. More specifically, we conclude:

1. Permit 17461 should be amended to delete point of diversion number one and Buhman Creek as a source of water.
2. It is in the public interest to adjust the relative priority of Permit 17461 and 17739.
3. It is in the public interest to approve the Petition for Extension of Time.

ORDER

IT IS HEREBY ORDERED that:

1. Point of diversion number one listed in condition 2 shall be deleted from Permit 17461.
2. The unnamed stream which is also known as Buhman Creek shall be deleted from condition 1 as a source of water for Permit 17461.
3. Condition 16 shall be added to Permit 17461:

This permit is junior in priority to the appropriative water rights of Clos du Val Wine Company, Ltd. under Application 25561 (Permit 17739).

(0000112)

4. Condition 8 of Permit 17461 is amended to read as follows:

Said construction work shall be completed on or before December 1, 1990. (000008)

5. Condition 9 of Permit 17461 is amended to read as follows:

Complete application of the water to the proposed use shall be made on or before December 1, 1992. (000009)

6. The last sentence of Condition 5 of Permit 17461 is deleted
(limiting diversion of water from Buhman Creek).

CERTIFICATION


The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on December 15, 1988.

AYE: W. Don Maughan
Darlene E. Ruiz
Edwin H. Finster
Eliseo M. Samaniego
Danny Walsh

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marche
Administrative Assistant to
the Board

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

ORDER

APPLICATION 24379

PERMIT 17461

LICENSE _____

ORDER APPROVING A NEW DEVELOPMENT SCHEDULE
AND AMENDING THE PERMIT

WHEREAS:

1. A petition for extension of time within which to develop the project and apply the water to the proposed use has been filed with the State Water Resources Control Board.
2. The permittee has proceeded with diligence and good cause has been shown for extension of time.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Paragraph 8 of the permit is amended to read as follows:

CONSTRUCTION WORK SHALL BE
COMPLETED ON OR BEFORE

December 1, 1985 (0000008)

2. Paragraph 9 of the permit is amended to read as follows:

COMPLETE APPLICATION OF THE
WATER TO THE PROPOSED USE
SHALL BE MADE ON OR BEFORE

December 1, 1986 (0000009)

3. Paragraph 12 of this permit is deleted. A new Paragraph 12 is added as follows:

Pursuant to California Water Code Sections 100 and 275, and the public trust doctrine, all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to protect public trust uses, prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

The continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to minimizing waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source.

Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) to installing, maintain-ing, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

The continuing authority of the Board also may be exercised by imposing further limitations on the diversion and use of water by the permittee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such action takes into account the public interest and is necessary to protect public trust uses. All such actions shall conform to the standard of reasonableness contained in Article X, Section 2 of the California Constitution. (00000 12)

Dated: MAY 10 1984

Raymond Walsh

Raymond Walsh, Chief
Division of Water Rights

STATE OF CALIFORNIA
THE RESOURCES AGENCY
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

PERMIT FOR DIVERSION AND USE OF WATER

PERMIT 17461

Application 24379 of George C. Fotinos, Vivian Fotinos, Tom D. Fotinos and Martha Fotinos
1032 Roundhill Circle, Napa, California 94558 *(over)*

filed on May 25, 1973, has been approved by the State Water Resources Control Board SUBJECT TO VESTED RIGHTS and to the limitations and conditions of this Permit.

Permittee is hereby authorized to divert and use water as follows:

1. Source:

Tributary to:

<u>Unnamed Streams (2)</u>	<u>Napa River</u>
<u> </u>	<u> </u>
<u> </u>	<u> </u>
<u> </u>	<u> </u>
<u> </u>	<u> </u>

2. Location of point of diversion:	40-acre subdivision of public land survey or projection thereof	Section	Township	Range	Base and Meridian
1. S150 ft and E2200 ft from W $\frac{1}{4}$ Corner of Section 20 Reservoir	NE $\frac{1}{4}$ of SW $\frac{1}{4}$	20	5N	4W	MD
2. S350 ft and E2100 ft from W $\frac{1}{4}$ Corner of Section 20	NE $\frac{1}{4}$ of SW $\frac{1}{4}$	20	5N	4W	MD

County of Napa

3. Purpose of use:	4. Place of use:	Section	Township	Range	Base and Meridian	Acres
Wildlife Enhancement	Fotinos Reservoir in NE $\frac{1}{4}$ of SW $\frac{1}{4}$					
Recreational		20	5N	4W	MD	
Frost Protection						
Irrigation	SW $\frac{1}{4}$ of NW $\frac{1}{4}$	20	5N	4W	MD	5
	SE $\frac{1}{4}$ of NW $\frac{1}{4}$	20	5N	4W	MD	10
	NE $\frac{1}{4}$ of SW $\frac{1}{4}$	20	5N	4W	MD	10
					Total	25

The place of use is shown on map filed with the State Water Resources Control Board.

IP 17461

3-19-84 ownership chgd to George C. Vivian +

5. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 25 ACRE-Feet per annum to be collected from September 1 of each year to June 1 of the succeeding year.

THIS PERMIT DOES NOT AUTHORIZE COLLECTION OF WATER TO STORAGE OUTSIDE OF THE SPECIFIED SEASON TO OFFSET EVAPORATION AND SEEPAGE LOSSES OR FOR ANY OTHER PURPOSE.

THE MAXIMUM RATE OF DIVERSION TO OFFSTREAM STORAGE SHALL NOT EXCEED 100 CUBIC FEET PER SECOND.

(000005)

6. The amount authorized for appropriation may be reduced in the license if investigation warrants. (000006)

7. Actual construction work shall begin on or before two years from date of permit and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.

(000007)

8. Said construction work shall be completed on or before DECEMBER 1, 1981. (000008)

9. Complete application of the water to the proposed use shall be made on or before DECEMBER 1, 1982. (000009)

10. Progress reports shall be submitted promptly by permittee when requested by the State Water Resources Control Board until license is issued.

(000010)

11. Permittee shall allow representatives of the State Water Resources Control Board and other parties, as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit.

(000011)

12. Pursuant to California Water Code Section 100 all rights and privileges under this permit and under any license issued pursuant thereto, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

This continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to minimizing waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (3) suppressing evaporation losses from water surfaces; (4) controlling phreatophytic growth; and (5) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

(000012)

13. The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Resources Control Board if, after notice to the permittee and an opportunity for hearing, the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the Board finds that (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

(000013)

4. THIS PERMIT IS ISSUED SUBJECT TO THE APPROPRIATIVE WATER RIGHTS OF VINIFERA INEYARDS AS STATED UNDER APPLICATIONS 24219 AND 24221.

(000T 001)

5. THE STATE WATER RESOURCES CONTROL BOARD RESERVES JURISDICTION OVER THIS PERMIT

TO IMPOSE ANY APPROPRIATE CONDITIONS AT SOME FUTURE DATE TO CONFORM THE PERMIT

TO BOARD POLICY ON USE OF WATER FOR FROST PROTECTION. ACTION BY THE BOARD WILL

BE TAKEN ONLY AFTER NOTICE TO INTERESTED PARTIES AND OPPORTUNITY FOR HEARING.

(000020)

This permit is issued and permittee takes it subject to the following provisions of the Water Code.

Section 1390. A permit shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code), but no longer.

Section 1391. Every permit shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions therein expressed.

Section 1392. Every permittee, if he accepts a permit, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation of any competent public authority of the services or the price of the services to be rendered by any permittee or by the holder of any rights granted or issued under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any local subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Dated: OCTOBER 23 1978

STATE WATER RESOURCES CONTROL BOARD

C. W. Hickey
~~Chief, Division of Water Rights~~
 Executive Director,

Water Rights and Administration